



**I**ndigenous **N**etwork on  
**E**conomies and **T**rade

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## Memorandum

**To: Indigenous Peoples**  
**From: Arthur Manuel, INET**  
**Date: 29 February 2009**

**RE: FIRST NATION LEADERSHIP COUNCIL BRITISH COLUMBIA RECOGNITION LEGISLATION**

This Memorandum is on the British Columbia First Nations Leadership Council's Draft Outline for the Recognition Legislation. The BC Leadership Council is comprised of Grand Chief Ed John from the First Nation Summit, Grand Chief Stewart Phillip from the Union of British Columbia Indian Chiefs and Shawn Atleo, BC Vice Chief for the Assembly of First Nations. The First Nation Leadership Council did get mandates from their respective organizations to "pursue the enactment of provincial recognition legislation".

Please find attached three documents, a letter to the Chiefs of British Columbia, a Discussion Paper on Instructions for Implementing the New Relationship and a power point for the All Chiefs Forum on Proposed Recognition Legislation February 25, 2009.

It is very important to go over all these documents because, if this provincial legislation is adopted, it will have a very serious impact on your Human Rights as Indigenous Peoples and how land and resources are managed in your traditional territories.

This is a very *urgent matter* because the Union of British Columbia Indian Chiefs, Chiefs Council will be dealing with this matter on March 2<sup>nd</sup>, The First Nations Summit will meet on March 4<sup>th</sup> & 5<sup>th</sup> and an All Chiefs' Forum is scheduled during the week March 23 – 27 but the Chiefs meeting is subject to funding. The deadline for approval for the provincial Recognition Act is April 2<sup>nd</sup>. You need to get your elected Chief to VOTE NO to the provincial Recognition Legislation.

### **Endorsing Provincial Legislation:**

The real striking matter about the Recognition Act is that it is proposed as a provincial legislation. The federal government is not even mentioned in this legislative scheme. Our Elders always made it clear that our relationship is with the federal Crown, that the province is a lower level government. It does not have power to sign international treaties and does not have sovereignty like Indigenous Peoples. Actually its interests are diametrically opposed to

Indigenous Rights, since the province wants to claim 100% exclusive jurisdiction over our land and resources. Under the Canadian constitution land and resource rights fall under provincial jurisdiction, but for lands reserved for Indians and Aboriginal title lands which fall under a federal fiduciary obligation and are protected by Section 35 of the Canadian constitution. The province knows all too well what not having power over Indigenous proprietary rights means, Since the Supreme Court of Canada found that Aboriginal Title existed, because nothing the province did, did extinguish Aboriginal Title including issuing “fee simple”. Endorsing the Recognition Act would change this and clearly put the province in control of defining Aboriginal Title and Rights. The First Nation Leadership Council does not seem to know the history of why Indigenous Peoples have always engaged with federal and not provincial governments.

This is not the first time this provincial government is taking an initiative on Aboriginal Rights; the first one was when they held the referendum to further limit Aboriginal rights. This clearly racist approach was promoted by then Attorney General Geoff Plant as “a chance for ordinary British Columbians to have a say in the treaty process.” That the government’s position has not changed a bit is evidenced by the fact that they appointed Geoff Plant as their chief negotiator for the so-called Recognition Act. Having earned a reputation as an “Indian fighter” already as opposing counsel on the Delgamuukw case and then Attorney General, he seemed predestined for the job to maintain the province’s entrenched position. This was further confirmed by Vaughn Palmer in an interview with Premier Gordon Campbell when asked about the “New Relationship” and the change in his position on Aboriginal rights. Gordon Campbell answered that his position had not changed at all, the ones to be commended are indigenous leaders who have had the courage to start working with the provincial government and who are sticking their head out.

### **Federal Devolution:**

Indigenous Peoples issues and/or “Indian and Lands Reserved for Indians” were made federal matters because our proprietary interests were in direct competition with the provincial government and in order to protect our proprietary interest, it would be better if our relationship was with the federal government. Furthermore, the old Treaty relationships were with the federal government and not the provincial government, because only the federal government can sign treaties under international law. The federal government has always been trying to shift their responsibility to Indigenous Peoples to the provincial government in order to make us ordinary Canadians. This was the purpose behind the 1969 White Paper Policy. In fact the Union of British Columbia Indian Chiefs (UBCIC) was formed in Kamloops in 1969 to fight against our federal Indian reserves becoming provincial municipalities. Therefore it is very contradictory that the UBCIC is proposing the Recognition Act which would give the province the power to define Aboriginal Title and Rights.

### **We Got Recognition:**

The Recognition Act does not offer more than what has already been judicially recognized by the courts. In fact judicial recognition has resulted in a number of other decisions which resulted in the “Referral” and “Consultation and Accommodation” processes. The fact that BC government has not been recognizing Aboriginal Title despite judicial recognition makes them look stupidly

stubborn and out of touch with reality. The Recognition Act is really a political plus for the province especially if they can get us to give them control so they can narrowly define what Aboriginal Rights really mean. The real question is: What will Indigenous Peoples get out of it?

### **Comments: Discussion Paper on Instructions for Implementing the New Relationship**

#### **Context:**

The context of the Recognition Act is to pick up where the BCTC Treaty Process failed to “secure” a major settlement with regard to Aboriginal Title and Rights. It is ironic that the term “New Relationship” was first introduced in the first annual report of the BC Treaty Commission in 1994. Ten years later the newer New Relationship served as life support for the stalled treaty process and as window-dressing in the lead-up to the 2010 Winter Olympics. I suppose the only striking difference between the present New Relationship and the past New Relationship is that the Union of BC Indian Chiefs and the BC Assembly of First Nations are involved in present New Relationship. It is also important to think about the present New Relationship in view of the past New Relationship because some of the parties in past New Relationship are involved in the present New Relationship. The present New Relationship will be manifested through a provincial legislative package that “includes the development of regulations, template shared decision-making and revenue and benefit sharing agreements and the issuance of a Proclamation” regarding Aboriginal Title and Rights”. The latter will not take the form of a law and will therefore serve more as a political publicity stunt than a substantive commitment.

#### **Purpose:**

The primary purpose of the Recognition Act is to provide economic certainty by giving the province the power to establish an engagement framework for recognition of Aboriginal Title and Rights. This framework concedes that British Columbia can continue on with business-as-usual and that under some specific circumstances a recognition processes may be triggered that will decide if Aboriginal Title and Rights will apply on the ground for specific Indigenous Nations. Establishing the trigger point for Aboriginal Title will require research, proposal writing and negotiations even though the Discussion Paper says that no proof is necessary.

The implementation of the Recognition Act is supposed to “contribute to certainty for Indigenous Nations and third parties”. It is very slick how the province has shifted provincial government uncertainty to certainty for Indigenous Nations and third parties. In fact third parties are putting pressure on the provincial government because third parties are the bodies that took defective title under provincial government laws. Provincial government uncertainty actually equals the value of Aboriginal Title because this kind of uncertainty cannot be economically dealt with by provincial law making powers. The cost of removing provincial government uncertainty and the benefit Indigenous Peoples get will define in economic terms the value of Aboriginal Title in terms of establishing access and benefit to our traditional territories.

The real question is do you want the provincial government determining what your Aboriginal Title and Rights are? The province really limited the possibility of success in negotiations at the British Columbia Treaty Commission by limiting indigenous rights and aiming at their

extinguishment and it will take a similar position in negotiations regarding implementation of the Recognition Act.

### **Scope:**

The scope of the Recognition Act is very limited. It basically gives the province a foot in the door when it comes to legislatively or legally talk about what Aboriginal Title and Rights but it does not change the status quo. True recognition of Aboriginal Title would require real and substantive changes to existing provincially created property interests including fee simple and the distribution of powers between the federal and provincial governments to include Indigenous Peoples. The fact that the Recognition Act clearly does not include these kinds of changes means that the province is not really interested in substantively recognizing Aboriginal Title and Rights. The downside of agreeing to exclude these essential aspects of recognizing Aboriginal Title and Rights means we have agreed to de facto to limit the scope of our Aboriginal Title and Rights to conform to the process.

The scope of the Recognition Act looks a lot like the federal and provincial mandates that Aboriginal BCTC Negotiators have recently been complaining about, namely that the federal and provincial governments are coming to the table with “fixed bottom line positions”. The reason the federal and provincial governments come to the table with fixed bottom line positions is because they have agreed to maintain the existing distribution of powers under the Canadian Constitution 1982. This means that Aboriginal Title and Rights that are protected under section 35 of the Canadian Constitution will not increase because the federal and provincial government powers will not correspondingly decrease and allow recognition of Aboriginal Title and Rights to proportionately increase. We are talking about our traditional territories and recognition of Aboriginal Title and Rights means that the federal and provincial governments need to give up power over our land in order to achieve real recognition, otherwise it is counterproductive and dangerous to endorse a provincial government Recognition Act that is purely symbolic in scope.

### **Recognition Principles:**

These Recognition Principles really do not even go as far as the courts have gone in recognizing Aboriginal Title and Rights but in turn the Province has us endorsing provincial Crown title as existing in our Aboriginal Title territories. Provincial Crown title does not exist where federal Crown title exists nor does it exist in our exclusive use areas. True recognition would be to have indigenous territories recognized and to provide for exclusive use areas that will not be under either the federal or provincial governments because they will exclusively be held under section 35 of the Canadian Constitution 1982.

The Recognition Principles may sound good but they must be read in view of the Context and Scope of the Recognition Act. The Context and Scope do seriously diminish any substance in the Act. These Principles are what the provincial government public relation experts are playing up to the media. It makes the province sound like they are making some giant strides forward but they do not explain that these Principles are couched in some really narrow constitutional restrictions.

The other aspect that seems to be used is that these Recognition Principles are affirmed “without requirement of proof or strength of claim”. This may sound like you are getting something for nothing but everything has its price. Good research and being prepared is always essential when fighting to get your land back. This kind of promise makes us sound a little elementary. This provision also contradicts the provision of establishing the research that will be needed to identify the “proper title and rights holders” under the Indigenous Nation-Rebuilding section of the Recognition Act.

### **Indigenous Nation-Rebuilding:**

This aspect of the Recognition Act would actually be funny if it wasn't real. The Recognition Act will give the provincial government the right to define what our Indigenous Nations are. I suppose the reason they are doing this, is because of their experiences under the BC Treaty Process where every Indian Band assumed the role of being a First Nation. This has led to serious problems of overlap where Indigenous peoples were laughed at in the media for supposedly claiming 110% of the province. The Recognition Act will define what an Indigenous Nation is according to the Tsilhqot'in case that “identified the proper title and rights holders by reference to the four common threads of language, customs, traditions and shared history”. In that case the Nation and not the Band were considered the rightful title holders. Under the Recognition Act the province will be looking to create “one political structure” to enter into recognition agreements with.

Rebuilding our Nations is our business and not the responsibility of the provincial government. It is important however to realize that we need to do research and we need to organize ourselves. We cannot just be making deals as Indian Bands, saying that, the rest of the Nation will not get together so why should I not get ahead. That kind of short term thinking will leave our grandchildren with nothing. We need to think ahead. We need to make our Nations our number one priority. When we are at Nation meetings we shouldn't be talking carving up our Nation into Band interest but start talking about what we can do individually and as Bands to build our Nation. We need to quit talking about our Band or our Band Office. That kind of DIA thinking is what undermines building our Nations. Leave the Band talk for Band meetings.

### **Indigenous Nation Commission:**

The provincial government with the collaboration of the First Nations Leadership Council will create an Indigenous Nation Commission which would “facilitate the identification, formation or reconstitution of the political structures of Indigenous Nations”. Our nationhood is an Aboriginal Right and cannot be subject to provincial legislation. The province is clearly overstepping their bounds. The Canadian Constitution 1982 section 35 (1) states that the federal and provincial governments will recognize and affirm existing Aboriginal and Treaty rights. This would mean that establishing the Indigenous Nation Commission would be unconstitutional especially since it clearly involves the internal constitutions and governments of Indigenous Nations based on Aboriginal Rights. This aspect of the Recognition Act is contradictory to the “Scope” of this proposed legislation where it states that it will not alter the constitution. Indigenous Peoples must not and cannot support this kind of provincial government assertion of power over Aboriginal Title and Rights and us as Indigenous Peoples.

## **Shared Decision-Making and Revenue and Benefit Sharing:**

The Recognition Act will establish three levels of engagement under Comprehensive, Interim and Default processes. The specific policies for the engagement processes were not elaborated in these documents, except to say that they will be developed by the First Nation Leadership Council and British Columbia government in a top down approach.

The First Nation Leadership Council and the British Columbia government are trying to get support for the Recognition Act by promising that through this provincial government experience or process Indigenous Nations will be offered "Shared Decision Making" and "Revenue and Benefit Sharing" Agreements. It is impossible to argue that Indigenous Nations should not share in decision making and benefit from revenue raised through the province using our land. The real issue is what will this cost us in the short term and the long term. Under this Recognition Act it will be under provincial jurisdiction with the collaboration of the First Nations Leadership Council when permitted by specific provision in the Recognition Act.

### **(a) Comprehensive**

The Comprehensive engagement is “triggered by reconstitution of an Indigenous Nation” under the power of the provincially created Indigenous Nation Commission. The Comprehensive recognition process would “put into affect by agreements respecting planning, management, tenuring and revenue and benefit sharing”.

### **(b) Interim**

Interim engagement will be triggered for categories of decisions which will be agreed upon by the First Nation Leadership Council and the British Columbia government. “Decisions will be designed to accommodate and not compromise the interests of the parties”.

### **(c) Default**

The default engagement is based on “cases where the courts would now apply the honour of the crown principles”. This approach would apply to all other areas that do not fall under the Comprehensive and Interim forms of engagement.

## **Enabling Statutory Decisions Makers to Honour the Engagement Principles:**

The Recognition Act would allow provincial bureaucrats that follow the recognition principles to make decisions and take action amongst them so that they can make agreements with Indigenous Nations.

## **Council of Indigenous Nations:**

The BC Constitution Act will be amended to create a Council of Indigenous Nations. This would mean that the province would create a special Indigenous Council with a mandate to be

agreed to by the First Nations Leadership Council and the government and implemented through provincial government regulation. This sounds so much like the 1969 White Paper Policy.

### **Dispute Resolution:**

There is not much on dispute resolution. I would expect that there will be a lot of disputes but the Recognition Act supposes they will be talked out politically. The Act would contemplate mediation in terms of interpretation and implementation of the Recognition Act, but does reference going to court.

### **Proclamation:**

Proclamations must be based on substance and not just be made to make people appreciate poetry. Human Rights violations by Canada and the British Columbia government are manifested in the poverty of our peoples in one of the richest countries in the world. Our poverty is not because our land is poor but because all decisions made about our land are either made in Ottawa or Victoria. That is the crux of the human rights violations we experience, since the Canadian and British Columbia governments do not legally, constitutionally, politically and economically recognize our ownership over our traditional territories because we are Indigenous Peoples. The substantive lack of fundamental change in this racially discriminatory policy is reflected in how British Columbia manipulates recognition to mean a complicated recognition process for us and ongoing economic certainty for themselves. We should never endorse any Proclamation unless it means real meaningful change for ourselves.

### **Ratification:**

Ratification for something like the Recognition Act must come from the grassroots peoples. It cannot be done amongst the First Nation Leadership Council or amongst just the elected chiefs. The consequences of this provincial government legislation will have long, deep and very serious consequences on Aboriginal Title and that belongs to collectively as Indigenous Nations. It does not belong to the First Nation Leadership Council, First Nation Summit, Union of British Columbia Indian Chiefs or the BC Assembly of First Nations. It belongs to the Indigenous Peoples.

Aboriginal Title Recognition must start from the bottom and not from the top. It is the Indigenous Peoples who must define what Aboriginal Title means to them through good research that will clearly define their land use and occupancy as Indigenous Peoples. This kind of research is essential not only to clearly define our territories but also protect the ecological biodiversity that we all depend on. We need to get away from the idea that we do not need to define the baseline of our traditional knowledge that makes access to our traditional territories an essential element of our Aboriginal Title. That is why our Elders who are knowledgeable about our traditions and traditional land users need to take leadership in deciding what is best for us.

## **General Comment:**

The British Columbia government will get more out of this Recognition Act than Indigenous Peoples. Recognition of Aboriginal Title and Rights merely to manage them through existing provincial legislation will not help us contend with real conflicts regarding provincial government access to our traditional territories. “Shared Decision Making” and “Revenue and Benefit Sharing” will only benefit you if you agree that the microscopic gold mine should be in your traditional territory or that you want your land flooded by a hydro dam or you want your area sold right out from under your feet by a mass tourism operation. In real conflict situations regarding access to and benefits from our traditional territories we will still have to go to court.

This kind of limited and narrow approach to recognition will actually be counterproductive. It will confuse the general public and Indigenous Peoples that the British Columbia is really recognizing Aboriginal Title and Rights. In real practical terms only a few will benefit from this recognition package. The rest of development will remain complex and difficult to assess on our side of the table because of the lack of money.

## **The Cost of the Past New Relationship:**

The Present New Relationship has basically gutted the Past New Relationship that the BCTC is based on. It is important to quickly review the costs of negotiations under the Past New Relationship because negotiations regarding implementation of the Recognition Act will cost money too. The three forms of engagement will require proposals and negotiations. Who will cover the costs? In the BC Treaty Commission Report of 2008 it is stated that 50 First Nations borrowed \$345.6 million dollars since 1993. This borrowed money was supposed to be repaid by 2006 but has been extended to 2011, with or without a Final Agreement. The Department of Indian Affairs has already gone on record of wanting to collect these loans over 5 year period and charging 4.26% interest on these loans. The interest rate for the present BCTC Treaty Negotiation Loans will be \$ 38.8 million dollars over a five year period. Monthly payments would be collectively \$6.4 million dollars per month. Whenever you get involved in a scheme with the province of BC you should be very cautious if you need to pick up the tab.

The Past New Relationship with Canada and the British Columbia governments did not work because of the policy limitations imposed by the federal Comprehensive Land Claims Policy. There is of course a lot of pressure to find a quick alternative to the failure of the BCTC but it is always the grassroots that will have to pay through cut backs at the Band level when negotiation loans come due. Canada and British Columbia governments are slick and have set us up to either get our land or our cash. Negotiations can be just as costly as going to court if the policy purpose is to “extinguish” our Aboriginal and Treaty Rights or narrowly define them according to the “modified rights model” or according to the “Comprehensive, Interim and Default engagements of the Recognition Act”.

I never supported the BCTC Treaty Process but that does not mean I do not have feelings for Indigenous Peoples who borrowed money to negotiate and are now responsible to pay it back. I know that it will be the poor in our communities that will go without programs and service to pay for these loans. In most cases none of these people benefitted from these borrowed moneys. In



many cases they were totally unaware that money was being borrowed in their name. These loans were supposedly going to be paid off from the Final Agreement. That has now changed. I feel it is totally irresponsible for the British Columbia not to address what is going to happen with the \$345.6 million dollars loan to Indigenous Peoples, because it is clear that the province by endorsing the enactment of the Recognition Act have lost faith in the BCTC Treaty Process. I also feel it is totally financially irresponsible for the First Nation Leadership Council not to address the Indigenous Peoples who need to pay back these loans, about what kind of help they can get for paying back these \$345.6 million dollar loans for the past New Relationship, before they ask Indigenous Peoples to spend money on the present New Relationship.

### **Racial Discrimination:**

The Indigenous Network on Economies and Trade (INET) made an Early Warning and Urgent Action application on February 9, 2009 to the United Nations Committee for the Elimination of Racial Discrimination (CERD) in Geneva, Switzerland. (Copies of the submission are available on request.) The purpose of this Early Warning and Urgent Action is to point out that Canada racially discriminates against Indigenous Peoples by not recognizing our proprietary ownership of our traditional territories, despite the fact that the courts and constitution recognize and protect our Aboriginal Title and Rights. Our submission includes 4 different situations across British Columbia and involves one party that did not participate in the British Columbia Treaty Process and three parties that did negotiate under the British Columbia Treaty Process.

In the first situation involved the expansion of Sun Peaks Resort. There are presently no negotiations going at Sun Peaks yet Sun Peaks continues to sell off vacant lots for \$550 thousand dollars and houses for over a million dollars. This kind of selling land right from under our feet without negotiations demonstrates systemically how racially discriminatory Canada and British Columbia are. We asked CERD to tell Canada to stop expansion of the Ski Resort and negotiate with us.

The second situation involves the Xaxli'p First Nation where that First Nation pulled out of the British Columbia Treaty Process because they were not satisfied that negotiations were broad enough to accommodate recognition of their Aboriginal Title. The Department of Indian Affairs did send Xaxli'p a letter on February 27, 2007 asking repayment of their \$2.4 million dollar loan over 5 years at 4.26% interest which would make their payments approximately \$27,249 dollars per month. We asked the CERD to tell Canada not to collect on this loan and to review the entire negotiation loan fund program.

The third situation involved the Lheidli T'enneh where in March 2007 they voted against the BCTC Final Agreement and because of the elected chief and council want to avoid paying back the loan are still in the BCTC Treaty Process. The substantive purpose for staying in the process is to have a second vote. We asked CERD to tell Canada to quit using the loan as pressure tactic and not to ask for a second vote.

The fourth situation involves Bertha Williams from the Tsawwassen First Nation who raised with CERD that her Aboriginal Title will be extinguished on 3 April 2009 when the Tsawwassen Final Agreement will take effect. She asked that the Final Agreement should not take effect and

that vote for the Tsawwassen Final Agreement should be reviewed because of publicized efforts were used to buy support for the Final Agreement.

I raise these four issues because negotiations have had a really dramatic impact on our peoples and do cost a lot of money. We are arguing at the international level that Canada and the provinces by not recognizing Aboriginal Title is systemic racist. The systemic racism is manifested in the fact that we are dealing with four different situations but everyone of these situations create a tremendous amount of hardship for our peoples so that the federal and provincial governments do not have to recognize our Aboriginal Title and Rights.

At the international level we are Canada's most serious human rights problem. Canada does sit on the United Nations Human Rights Council so Canada does take their international image regarding Human Rights seriously. Canada and British Columbia are getting exposed for violating our human rights as Indigenous Peoples. The violation of our human rights is manifested in the poverty our peoples experience despite the fact that our territories support one of the richest provinces in one of the richest countries in the world. I feel that the province has seriously thought about enacting the Recognition Act and have decided it is better to recognize Aboriginal Title and Rights as long as it is administrated under provincial jurisdiction and therefore under their control.

There is no easy way out. The province has become accustomed to exclusively determining access and benefits for our traditional territories and they will not easily back off from taking 100% of the decisions and benefits. This three engagement recognition process is not really recognition but merely a process to tie up in another 10 year process of negotiations like the BCTC Treaty Process. Indigenous Peoples need to pull back from the negotiation table. We need to determine what Aboriginal Title and Rights are and we need to get the federal government back involved. Endorsing the Recognition Act simply with the provincial government on a "government-to-government" basis will seriously undermine our "Nation-to-Nation" relationship with Canada and the Crown. Canada and the province will use this legislation at the international human rights level to say they are not systemically racist. Yet the Recognition Act does not substantively recognize Aboriginal Title and Rights, it merely establishes a poorly crafted provincial government processes to recognize Aboriginal Title, probably similar to the modified rights model that got very limited acceptance under the British Columbia Treaty Process.

I do not support the British Columbia government and First Nations Leadership Council provincial government Recognition Act. I feel it undermines everything my family has worked for and is extremely dangerous for the future of our grandchildren.

Arthur Manuel

Geneva, Switzerland